Speedrack Products Group Limited *and* United Steelworkers of America, AFL–CIO, Petitioner. Case 10–RC–14124

December 29, 1995

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections to the conduct of the election held July 12, 1991, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 56 for, and 51 against, the Petitioner, with 8 challenged ballots a number sufficient to affect the election results.[1]

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this decision.[2]

Among those found eligible to vote by the hearing officer, were four work-release inmates (WRs): Raymond Irvin, Danny Blackstock, Wilbert Smith, and Phil Kelly. The hearing officer found that they were employees within the meaning of the Act and that they shared a sufficient community of interest with the ''free world'' unit employees and recommended overruling the challenges to their ballots. The Petitioner excepts, contending that the WRs do not share a community of interest with the bargaining unit employees because of the control exerted by the Alabama Department of Corrections (DOC).

We affirm the factual findings of the hearing officer as summarized in section I below, but for the reasons discussed in section II, we find merit in the Petitioner's exceptions. Therefore, we shall sustain the challenges to the ballots of the four WRs.

I. FACTUAL FINDINGS

The Employer is engaged in the manufacture of storage racks at its Hamilton, Alabama facility. The Employer has an agreement with the DOC to hire inmates who are participating in a community-based work-release program that allows an inmate to be placed in ''free world'' employment in a regular job just before he completes his sentence and is released on parole.

The four WRs, while on the job, receive the same wages, vacation, holidays, health insurance, and other benefits as ''free world'' employees. The methods for resolving WRs' on-the-job problems or complaints within the plant are, with some significant limitations, similar to those applied to other employees.[3] Unlike the other employees, however, the WRs are not allowed to work around firearms or alcoholic beverages.

The DOC work-release program guidelines state that if it is available, inmates must use public transportation to get to and from work. If public transportation is not available, the WRs are transported to and from the Employer's facility, and the WRs are required to reimburse the State on a per-ride basis. Newton testified that with respect to the program involved here, the State itself transports the inmates in vans. Unless WRs are performing overtime work, DOC requires that they report back promptly to the work-release center upon finishing their work shifts. A WR's paycheck is made payable jointly to the DOC and the WR, and the WRs are required to turn the paycheck over to the DOC. The DOC then makes certain deductions while paying a stipend to the WRs, who can only use a DOC predetermined weekly amount for personal expenditures. The remainder is retained by DOC in an escrow account for the WRs and is turned over to them upon their release from prison.

The DOC performs periodic checks on the WRs' job performance by conducting interviews with their supervisors regarding their progress. The DOC can remove WRs from the job if there are complaints about their behavior, whether from individuals in the workplace or in the community outside, or if there are security considerations. Further, a WR who refuses to work overtime as ordered by the Employer or quits his job without good cause can be subject to prison discipline, and discipline will be imposed if the WR engages in willful negligence or misconduct.[4]

There are no state laws or regulations restricting the rights of WRs to belong to, or be represented by, labor organizations. Since 1984, however, it has been the policy of the DOC, as articulated by Harry Lyles, its chief legal advisor, that WRs may not join unions, and WRs have generally not been placed in unionized plants. The DOC maintained that policy because in its

[1] The unit is:

All production and maintenance employees employed by the Employer at its Hamilton, Alabama facility, excluding office clericals, technical employees, professional employees, guards and supervisors as defined in the Act.

[2] We agree with the hearing officer's recommendations with respect to the objections and the challenges to the ballots of Ray Harper and Steven B. Wells. In the absence of exceptions, we adopt the hearing officer's recommendation to overrule the challenge to the ballot of employee Porter and to the ballot marked ''No'' on the back.

[3] Correctional Officer Robert Newton testified that ''if he does have a problem, we hope the inmate will come to us also. We don't want him going down there blowing off, you know, and causing an argument or something. Nothing of that type.''

[4] Newton also testified that a refusal to work overtime is considered the same as a refusal to work and subjects the inmate to discipline and that more than likely, such discipline will result in the loss of ''custody'' and the inmate will be transferred from the work-release center to the county jail or a major prison facility.

view ''any type [of] union activity (active or passive) by participants in the work release program would interfere with the [program's] objectives and would serve no purpose in furthering [the participants'] rehabilitation.'' Participation by WRs in any kind of union activity would be grounds for termination from the WR program. A legal opinion letter, solicited by the Employer, and written by Lyles after the election, and approved by a DOC commissioner, stated the view of the DOC that WRs were, however, allowed to vote in Board elections and to work within a bargaining unit with union representation.

II. DISCUSSION

We find that there are significant factors that distinguish the WRs from the ''free world'' employees and that these factors make it inappropriate to include the WRs and the ''free world'' employees in the same unit.

First, we begin with the workplace differences between the two groups of employees. When ''free world'' employees have workplace complaints or grievances, they can present them, without restriction, to the Employer. By contrast, when WRs wish to present complaints or grievances, they must be careful to avoid ''causing an argument or something.'' It is difficult to imagine how a complaint or grievance against the Employer can be presented to the Employer without running the risk of ''causing an argument or something.'' Thus, in an area that is vital to collective activity, viz, presenting complaints or grievances to the Employer about the workplace, the WRs do not have the freedom enjoyed by the ''free world'' employees.[5] Indeed, if unit employees were covered by a collective-bargaining agreement, the WRs would not be able to participate meaningfully in the grievance-arbitration process.[6]

Second, a WR who refuses to work mandatory overtime is subject to prison discipline. Obviously, a ''free world'' employee who so refuses is not subject to such discipline. Similarly, a WR who engages in misconduct at work is subject to prison discipline. A ''free world'' employee who does so is not subject to such discipline. Further, if fellow employees or members of the public complain about the work behavior of a WR, or if there are security problems, the Alabama Department of Corrections (DOC) can remove the WR from the job. A ''free world'' employee can be removed only by the Employer. Finally, a ''free world'' employee is free to quit the job, with or without good cause. If the WR quits the job without good cause, he or she is subject to prison discipline. Therefore, we believe that these significant workplace differences make it inappropriate to include the WRs in the ''free world'' unit.

Our dissenting colleague asserts that ''free world'' employees are vulnerable to employment sanctions for refusing to work overtime and for not ''behaving responsibly.'' We assume, arguendo, that this is true. Those employees, however, are not subject to prison discipline for such conduct. The WR employees are subject to such discipline. The difference is obvious and substantial.[7]

Furthermore, we believe that other considerations also militate against inclusion of the WRs in the ''free world'' unit. In this regard, we note that, at the end of their workday, WRs must return promptly to the work-release center. Thus, they are not free to engage in employee activities that are customary in a normal collective-bargaining relationship. For example, if ''free world'' employees wish to meet, during off-duty hours, in order to plot bargaining strategy or plan a response to the denial of a grievance, the WRs would not be free to join them. Similarly, if ''free world'' employees wish to picket the Employer during off-duty hours, the WRs are not free to join the activity. Finally, if ''free world'' employees wish to strike, the WRs must either work during the strike or return to the work-release center. Because all of these activities are part and parcel of the collective-bargaining process, and because the WRs cannot join the ''free world'' employees in any of them, we believe that inclusion of the WRs in the ''free world'' unit is unwise and undermines the cohesiveness and bargaining strength of the otherwise appropriate unit.[8]

Finally, our dissenting colleague chides us for not citing a case that squarely supports our position. The reason is simple: there are no such cases. The factual situation presented here has not occurred before. The cases on which our colleague relies are distinguishable as is, frankly, a case, *National Welders Supply*, 145 NLRB 948 (1964), with the same result we have found here. All of the cases turn on the extent to which the WR employees differ from the ''free world'' employ-

[5] Our dissenting colleague construes Newton's phrase ''causing an argument or something'' to mean only that ''angry outbursts'' are to be avoided. In response, we note that this is not what the above-quoted record testimony reflects. Moreover, even ''angry outbursts'' in grievance proceedings are tolerated under the Act.

[6] This restriction on presenting grievances or complaints at the workplace was not present in the cases cited by our dissenting colleague. Because the freedom to grieve is an integral part of a collective-bargaining relationship, we believe that this distinction is a significant one.

[7] Contrary to our colleague's quotation from *Winsett-Simmonds*, we are speaking of discipline for infractions at work, not of control ''at other times.''

[8] Our dissenting colleague argues that the State's prohibition on union membership for WRs is preempted. Our focus, however, is on the State's policy of requiring the WRs to return at the end of the workday to the work-release center. That policy is clearly valid, and it has an obvious practical impact on the ability of WRs to engage in collective-bargaining activities.

ees. As discussed herein, we believe that these differences are substantial and real.

Accordingly, we reverse the hearing officer's finding that the WRs have a community of interest with the other unit employees, and we sustain the challenges to the ballots cast by Raymond Irvin, Danny Blackstock, Wilbert Smith, and Phil Kelly. In view of our sustaining the challenges to these four ballots, the remaining challenges are not determinative. Therefore, we shall issue a Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of valid ballots have been cast for the United Steelworkers of America, AFL–CIO, and that it is the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by the Employer at its Hamilton, Alabama facility, excluding office clericals, technical employees, professional employees, guards and supervisors as defined in the Act.

CHAIRMAN GOULD, concurring and dissenting.

I am in agreement with my colleagues in adopting the hearing officer's recommendations regarding the disposition of objections and the challenges to the ballots of employees Harper, Wells, and Porter and to the ballot marked ''No.'' Contrary to my colleagues, however, I would find, in agreement with the hearing officer, that whatever restrictions the DOC may place on the work-release (WR) employees, they do not warrant a finding that these employees lack a community of interest with other unit employees and should therefore be excluded from the unit.

The hearing officer correctly stated that ''the test as to whether an employee shares a community of interest with his fellow employees depends on his status while in the employment relationship and not what ultimate control he may be subjected to at other times.''[1] Here, the WR employees are completely integrated into the Employer's work force enjoying the same wages, hours, and other terms and conditions of employment. The WR employees work side by side with the ''free world'' employees and are subject to the same supervision as them while performing bargaining unit work. In addition, the WR employees participate with the ''free world'' employees in the Employer's fringe-benefit programs. Furthermore, most of the DOC's rules, with one notable exception discussed below, either concern off-work activities of the WR employees or generally require them to behave responsibly. Therefore, consistent with Board precedent, I agree with the hearing officer that the WR employees have a substantial community of interest with the other bargaining unit employees and the challenges to their ballots should be overruled.[2]

The only significant difference between this case and what I regard as the dispositive precedent—*Winsett-Simmonds* and *Georgia-Pacific*, supra—is the alleged restriction on the WR employees' union activity.[3] My colleagues find that this restriction defeats any community of interest that the WR employees might otherwise have with the other unit employees. The Employer argues that the asserted restriction on joining unions is not cognizable because it is not embodied in any statute, official regulation, or judicial authority.[4] In any event, it contends that any such restriction would be preempted by Federal law.

I am willing to assume, arguendo, that the DOC has at least an informal policy of prohibiting WR employees from joining unions; but unlike my colleagues, I agree with the Employer that any such policy is preempted by Federal law, at least when the State has chosen, as here, to place the WR employees in positions with private sector employers where they work alongside ''free world'' employees, sharing their terms

[1] *Winsett-Simmonds Engineers*, 164 NLRB 611, 612 (1967). See also *Georgia-Pacific Corp.*, 201 NLRB 760 (1973).

[2] *Rosslyn Concrete Construction v. NLRB*, 713 F.2d 61, 63 (4th Cir. 1983).

[3] In my view, the DOC's ability to sanction WR employees for refusing to work mandatory overtime or for other workplace misconduct does not meaningfully distinguish this case from *Winsett-Simmonds*, supra, in which the Board noted that the penal farm could remove work-release employees from the program if they did not ''abide by certain rules of conduct,'' including a requirement ''inter alia, that [the work-release employee] report promptly for work and return to the Penal Farm if no work is available.''

My colleagues' reference to what they characterize as the WR employees' inability ''to participate meaningfully in the grievance-arbitration process'' rests on the testimony of Correctional Officer Newton concerning the DOC's ''hope'' that a WR employee would ''also'' bring any workplace problems he had to the attention of DOC staff and Newton's concern that WR employees not be ''blowing off'' and ''causing an argument.'' It seems likely to me that any correctional facility would be concerned about prisoners engaging in angry outbursts on the job, but I do not construe Newton's testimony about the desires and concerns of DOC staff as necessarily precluding WR employees from making meaningful use of any grievance and arbitration machinery that might be negotiated by a union and an employer.

[4] The record shows that there are no state laws or regulations restricting the rights of WRs to belong to, or be represented by, labor organizations. As stated in the factual findings, however, the DOC has generally not placed prisoners in unionized plants, and although Harry Lyles' 1984 opinion letter announced a policy of prohibiting WRs from either joining unions or participating in union activities, the letter opinion did not speak to the question of voting in Board elections. The WRs in question here were never informed of any prohibition against joining unions or participating in union activities, and they voted in the Board election without interference from the DOC. Moreover, I particularly note that after the election, in a letter solicited by the Employer, Lyles expressed a change in opinion, to the effect that ''inclusion in the bargaining unit, and participation in the NLRB representation election'' was not prohibited by the DOC and indeed, was consistent with the goals of the work-release program.

and conditions of employment. Section 7 of the National Labor Relations Act guarantees to employees various rights and provides, in pertinent part, that ''[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . .'' Because this presents a direct conflict, i.e., a State is seeking to prohibit that which Federal law expressly protects, ''preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right.''[5] In other words, preemption occurs ''by direct operation of the Supremacy Clause.''[6] Therefore, to the extent that the State prohibits WR employees from joining a union, that prohibition is preempted by the National Labor Relations Act.[7] Accordingly, I find no basis for excluding the WR employees from the bargaining unit, and the challenges to the ballots they cast in the election should be overruled.

[5] *Brown v. Hotel Employees Local 54*, 468 U.S. 491, 501 (1984). This is not, therefore, an instance of preemption under the doctrine of *San Diego Trades Council v. Garmon*, 359 U.S. 236 (1959), which concerns conduct that is only arguably protected or prohibited by the Act. In cases of *Garmon* preemption, exceptions are made for state interests ''deeply rooted in local feeling and responsibility.'' Id. at 243–244. See discussion in *Brown v. Hotel Employees Local 54*, supra, 468 U.S. at 502–503, and cases there cited.

[6] *Brown v. Hotel Employees Local 54*, supra, 468 U.S. at 501.

[7] I do not reach the issue of the effect of state restrictions in the event of a labor dispute.